United States Court of Appeals

for the Second Circuit

APPELLANT'S REPLY BRIEF

To be argued by
Eric Schnapper

UNITED STATES COURT OF APPEALS
For the Second Circuit

B

Docket Number

75-7135

P/S

WILLY DREYFUS,

Plaintiff-Appellant,

v.

AUGUST VON FINCK, Munich, Germany, and MERCK, FINCK & CO., Munich, Germany,

Defendants-Appellees

REPLY BRIEF OF APPELLANT

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On Appeal From The United States District Court
For the Southern District of New York

REPLY BRIEF OF PLAINTIFF-APPELLANT

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REPLY BRIEF FOR PLAINTIFF-APPELLANT

Law of Nations

Appellees suggest, first, that plaintiff cannot sue under 28 U.S.C. § 1350 because the law of nations bestows rights "solely on nations" and it is only "the state, and not its citizens" which can enforce the law of nations. (Brief of Appellees, pp. 27, 29.) The express language of § 1350, however, confers jurisdiction over torts "committed in violation of the law of nations." Appellees ask the Court to render this section nugatory,

either by holding that no tort is ever committed in violation of the law of nations or that no violation of the law of nations is ever actionable. Neither such construction is permissible.

The intent of Congress in adopting § 1350 was to create federal jurisdiction to remedy conduct which was both tortious and the sort of activity inconsistent with "the law of nations". Appellees do not deny the alleged conduct was tortious, but contend it did not involve the law of nations because it was purely a private matter between the individuals involved and of no significance or concern to any nations. However, the complaint does not merely allege that defendants on their own had forcibly obtained plaintiff's property, but that this conduct was undertaken, in substantial measure, by the German government for the dual purpose of persecuting Jews and other aliens and as part of a plan for waging unprovoked aggressive war against a number of other nations.

Appellees' contention that the conduct alleged was a merely private tort, and thus not cognizable as a violation of the law of nations, is squarely inconsistent with their contentions (a) that no cause of action exists under the treaty clauses of §§ 1331 and 1350, despite the allegation that defendants' conduct was part of a plan to wage aggressive war in violation of several treaties, because such conduct would be exclusively the concern of the other nations

signing the treaties (Brief of Appellees, pp. 15--24), and (b) that this action is barred by the Act of State doctrine because it involves "the right of a nation to expropriate the property of an alien . . . which touches more sensitively the practical and ideological goals of the various members of the community of nations." (Brief of Appellees, p. 35) Appellees cannot defeat law of nations jurisdiction by contending on the one hand that the alleged conduct was purely private and of no concern to any government, and then, on the other, contend that the conduct is purely of governmental concern in order to defeat treaty clause jurisdiction and establish an Act of State defense.

The inconsistency in appellees' position arises, to some extent, from the fact that this case was dismissed prior to trial. There are unresolved questions of fact regarding the extent and nature of the involvement of German officials in the seizure of plaintiff's property. It is possible that, at trial, defendants-appellees will be able to adduce evidence which will preclude relief under one of the asserted bases of jurisdiction, such as by establishing that the seizure was not part of a plan to wage aggressive war. But this action can be dismissed prior to trial only if there are no facts which could be adduced in connection with the complaint which would entitle plaintiff to relief. That clearly is not the case here where there has been neither a responsive pleading, nor discovery of facts.

Treaty Violations

The primary thrust of the district court's decision with regard to jurisdiction under one or more treaties was that no treaty was enforceable in federal court unless the treaty expressly undertook to create a cause of action. (App.L, pp. 11-15; App. T, p. 10) Appellant's initial brief explained at length why, particularly in light of Article VI of the Constitution, a treaty is generally enforceable in the United States regardless of whether the treaty itself expressly contemplates such judicial action. (Brief of Appellants, pp. 23-31.) Appellees now advance a somewhat different argument, contending that a treaty is not enforceable unless it expressly purports to confer substantive rights on private individuals. (Brief of Appellees, pp. 10, 15-22)

Although the question of whether a treaty must expressly confer rights on a plaintiff to be enforceable has not been frequently or authoritatively considered by the courts, the same question has often arisen with regard to the enforceability of a statute. The suggestion that a statute is only enforceable by those upon whom it expressly confers a legal right last saw the light of day in an opinion by Judge Dyer in Barlow v. Collins, 398, 401 (5th Cir. 1968). That decision and doctrine was unanimously reversed by the Supreme Court in Barlow v. Collins, 397 U.S. 159 (1970), which held that a statute was enforceable by any person who was among those whom the statute was adopted to benefit. In a companion case, Association of Data Processing Service Org.

v. Camp, 397 U.S. 150 (1970), the Court explained that the test was "whether the interest sought to be protected by the complainant is arguably within the zone of interests to be protected or regulated by the statute or constitutional guarantee in question . . .. The Acts do not in terms protect a specified group. But their general policy is apparent; and those whose interests are directly affected by a broad or narrow construction of the Acts are easily identifiable." 397 U.S. at 153-157. This Court long ago rejected the argument that a statute was only enforceable by those on whom it expressly conferred a legal right. Norwalk CORE v. Norwalk Redevelopment Agency, 395 F.2d 920, 933 (2d Cir. 1968).

The standard as to who may seek redress under a statute is equally applicable to suits for redress for violations of a treaty. It cannot be seriously contended, with regard to the instant case, that the treaties banning war as an instrument of national policy were not meant to protect individuals. Obviously it is individuals who suffer the most egregious injury in an armed conflict, not only combatants but also citizens of neutral countries. The harm they suffer is not limited to death or wounding; war all too often brings with it the destruction or seizure of the property of innocent bystanders, as occured in this case. Undeniably it was to protect against such harm to persons and property that compacts such as the Kellog-Briand Treaty were signed. This case alleges, moreover, not merely the consequential injury which might follow from any outbreak

of hostilities, but the seizure of property in preparation for the deliberate and unprovoked breach of that treaty.

Both Appellees and the district court, in rejecting jurisdiction under the Hague Convention, rely primarily on the fact that, while Article 41 provides that an "injured party" is entitled to compensation, Article 40 uses the term "party" in a context in which it can only refer to a nation signing the Convention, not a private individual (Brief of Appellees, pp. 12-13; App. T, pp. 8-9.) The sole official text of the Hague Convention, however, is in French[1] and in the French version the term "parties" is used only in section 40, not in section 41.[2] Inasmuch as the draftsmen of the convention expressly did not limit redress under section 41 to the "parties," it is clear that no such limitation should be implied by the courts.

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1 36 Stat. 2277.

2 Article 40 provides:

> "Toute violation grave de l'armistice, par l'une des Parties, donne á l'autre le droit de la dénoncer et même, en cas d'urgence, de reprendre immédiatement les hostilitiés."

Article 41 provides:

> "La violation des clauses de l'armistice, par des particuliers agissant de leur propre initiative, donne droit seulement à réclamer la punition des coupables et, s'il y a lieu, une indemnité pour les pertes éprouvées."

Appellees contend that jurisdiction under 28 U.S.C. § 1331 exists to enforce only Executive Orders "specifically authorized by statute." (Brief of Appellees, p. 48.) Such a distinction among Executive Orders makes no sense. The President and other officials of the executive branch, in promulgating an Executive Order or other regulation, necessarily act pursuant to authority created by a statute, the Constitution, or a treaty, since it is from these three sources that all authority to promulgate Orders and regulations must derive. Section 1331 confers jurisdiction over actions arising under "the Constitution, laws, or treaties of the United States;" there is nothing on the face of the statute to distinguish between Executive Orders issued under authority of a statute and Orders issued under authority created by the Constitution or a treaty.

The sole decision drawing this distinction among Executive Orders is Stevens v. Carey, 483 F.2d 188, 191 (7th Cir. 1973), which refused to enforce a particular Executive Order on the ground it was not authorized by statute but was merely "a personal policy" of the President. But neither the President nor any other official of the executive branch has any inherent power to carry out "personal" policies; all authority must ultimately derive from a statute, a treaty, or the Constitution. The decisions of this Court do not recognize any such distinction among Executive Orders. See Murphy v. Colonial

Federal Savings & Loan Ass'n., 388 F.2d 609 (2d Cir. 1967). The rule suggested by appellees would lead to scholastic controversies as to which orders and regulations were authorized by statute rather than by, for example, the Constitution. In the instant case Military Law 59 was only promulgated after Congress had repeatedly authorized Army administration of occupied Germany.[3] In McDaniel v. Brown and Root, 172 F.2d 466 (10th Cir. 1949) and Crabb v. Wedden Bros., 164 F.2d 797 (8th Cir. 1947), on which appellees rely, the plaintiffs apparently never contended, and the court never considered the possibility, that jurisdiction might exist under § 1331 to enforce the Executive Orders there at issue.

The whole thrust of judicial construction of § 1331 in recent years has been to liberally construe what constitutes a "law of the United States" and to reject appellees' contention that this phrase covers only congressionally enacted statutes. Illinois v. City of Milwaukee, 406 U.S. 91, 98-101 (1972); Romero v. International Terminal Co.,[4] 358 U.S. 354 393 (1959). In adopting the Judiciary Act of 1875, which first provided for federal question jurisdiction in language essentially the same as in § 1331, Congress clearly intended to establish federal jurisdiction over all matters which Congress had the constitutional power to bring into federal court. Senator Carpenter, the

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[3] See e.g. 59 Stat. 404 (1945), 61 Stat. 71. 569, 625, 943 (1947).

[4] 18 Stat. 470.

sponsor of the bill stated:

> Th[e Judiciary] act of 1789 did not confer the whole power which the Constitution conferred, it did not do what the Supreme Court has said Congress ought to do; it did not perform what the Supreme Court has declared to be the duty of Congress.[5] This bill does . . . [T]he time has now arrived it seems to me when Congress ought to . . . vest the power which the Constitution confer in some court of original jurisdiction.[6]

It cannot be seriously contended that Congress lacked the constitutional power to give the federal courts jurisdiction to enforce any Executive Order or regulation.

Appellees suggest that, even if Military Law No. 59 is a law of the United States, the only forum in which that law may be enforced are the tribunals established by Military Law No. 59 itself. (Brief of Appellees, p. 53.) However persuasive this argument might have been in 1947, the tribunals in the form originally created or contemplated by Military Law No. 59 no longer exist, and thus cannot be the forum in which plaintiff can or must seek relief. Whether or not the German and Allied tribunals now in operation provide a more suitable forum for this case is essentially a question of forum non conveniens which must be resolved by the district court on remand in light

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[5] See Martin v. Hunter's Lessee, 1 Wheat. (14 U.S.) 304 (1816).

[6] Cong. Rec., 43rd Cong., 1st Sess., V.2, Pt. 5, pp. 4986-87 (1874).

of evidence as to the nature of those tribunals, the location of witnesses, etc.

Act of State Doctrine

In its decision of January 2, 1975, the district court, after discussing the Act of State doctrine, stated "we need not, however, rest our decision on this ground . . .." (App. T, p. 22.) The defendants-appellees read this as indicating that the district court would not decide whether the Act of State doctrine would bar this action. (Brief of Appellees, p. 31.) Plaintiff-Appellant agrees that the district court did not decide this issue, and suggests that it is thus unnecessary for this Court to consider on appeal the questions involved. In view of the fact that there is a question of fact regarding the role played by government authorities in the seizure of plaintiff's property by appellees,[7] the Act of State issues should be resolved by the district court after appropriate discovery.

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[7] See Appendix R, pp. 3-9.

of the United States Department of State.

CONCLUSION

For the above reasons the Order and Judgment of the District Court should be reversed.

Respectfully submitted,

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[illegible] is never a question

last date for suit, he should not

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